Supreme Court, U.S.
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No. 02-686

IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

STEVEN PRESCOTT; ROBERT F. BERRY; CHERYL JONES; KAREN PIERCE; AND CHRISTINE M. TURNEY,

Petitioners,

v.

COUNTY OF EL DORADO; SHARON LIBICKI; AND EL DORADO COUNTY EMPLOYEES ASSOCIATION, LOCAL NO. 1,

Respondents.

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit

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PETITIONERS' REPLY BRIEF

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February 2003

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ARGUMENT

Casting all of their eggs in one basket, Respondents ignore and apparently concede the serious conflicts among the Circuits as to the second question presented. Petition ("Pet.") at i, ¶ II and 23-28. However, they dispute virtually every particular as to the first question presented. Pet. at i, ¶ I; Respondents' Brief in Opposition ("Opp.") at 4-5.[1]

As to the facts, like the panel below, Respondents focus upon negotiation of the forced-unionism agreement, ignoring that the indemnification clause also caused Respondents County and Libicki to **enforce** the agreement by seizing agency fees from Petitioners. Opp. at 6; *but see* Appendix ("App.") C at 12a (emphasis added) (District Court's factual finding that "Absent the hold harmless clause, the County Defendants would not have entered into **or enforced** an agreement including a provision requiring union membership, or in lieu of union membership, payment of an agency fee.").[2] Coupling misidentification of the injurious action (the County's seizure of agency

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[1] A substantively identical question was presented in this case's first Petition, *see* Petition in Case No. 99-519 at i, in which this Court granted *certiorari*, vacated, and remanded. 528 U.S. 1111 (2000).

[2] Respondents nonsensically assert that the stipulation "makes the instant case an extremely poor vehicle to resolve the issue" because it renders the case "*sui generis*." Opp. at 12. The stipulation merely states the obvious as to why the indemnification clause exists. *See Stamford Bd. of Educ. v. Stamford Educ. Ass'n*, 697 F.2d 70, 74 (2d Cir. 1982) ("the logical reason why the contract contained a 'hold harmless' clause was because at least one of the parties (probably, the [indemnitee]), thought that there was a good chance that [the actions taken under the clause] in the Agreement would be held [illegal]"); *see also Wessel v. City of Albuquerque*, 299 F.3d 1186, 1199 n.3 (10th Cir. 2002) ("The alleged injury results from the indemnification provision's negation of any incentive for the City to ensure that the *Hudson* requirements were followed"), *citing Teachers Local No. 1 v. Hudson*, 475 U.S. 292, 310 (1986).

fees), with studied disregard of this pertinent fact, Respondents deny with sophistry the "affirmative link between the policy and the particular constitutional violation alleged," *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985).

At the same time, Respondents concede the retrospective relief available with a favorable judgment, though disingenuously claiming Petitioners did not seek it. It is of no moment that Petitioners did not explicitly "seek an order requiring the public employer . . . to *repay* to the union . . . any funds it had received pursuant to the indemnification agreement." Opp. at 13-14. In fact, they never had opportunity to, as lower courts never reached the remedial issue. Moreover, Petitioners sought "Such other and further relief as the Court may deem just and proper." Record ("R.") 1: Complaint at 12. This is sufficient to preserve their standing to seek disgorgement. *See Ellis v. Railway Clerks*, 466 U.S. 435, 442 & n.5 (1984) ("generalized claim for 'monetary damages . . .'" includes claim for interest); *see also Bloom v. National Labor Relations Board*, 153 F.3d 844, 848 (8th Cir. 1998) (claim for interest sufficient to preserve standing), *cert. granted, vacated, and remanded on other grounds*, 525 U.S. 1133 (1999).

The Record demonstrates that the County and Libicki have received legal counsel paid for by the union. R. 8; R. 90, ¶ 41. Thus, an appropriate remedy would require the County to reimburse the union for this representation. Moreover, the County Respondents would be liable for Petitioners' potential attorneys' fees and costs under 42 U.S.C. § 1988. Respondents ignore that the Record includes a discussion of remedies, and the potential for an order prohibiting the union from charging nonmembers for County Respondents' costs in defense of their lawsuit. R. 96 at 5-7.

Equally disingenuous is Respondents' claim that its "full refund of [Petitioners'] fees," "settle[s] the monetary aspect of this case." In fact, the Record demonstrates the on-going collective bargaining relationship between the County and the union, the on-going forced-unionism agreement, and the re-initiation of fees seizures on remand after the first appeal. R. 77 (order denying preliminary injunction). Coupled with the union's treatment of its costs in defense of Petitioners' lawsuit as "chargeable" to nonmembers, R. 90, Exhibit 3 at 2; R. 93 at 6 n.15 (defending treatment of such expenditures as "chargeable" to nonmembers), there is no genuine dispute that Petitioners possess sufficient legal interest to challenge the enforceability of the indemnification clause, and that the courts can enter effective relief granting them substantial economic benefits.

Most importantly, Respondents fail to cite even a single case conflicting with the axiomatic principle that public employees possess standing to challenge the constitutionality of one of their terms and conditions of employment. This is because the decision below, App. A at 1a-5a, stands alone in its disposition of the standing issue generally, and as specifically applied to indemnification clauses, and is in conflict with virtually every analogous authority. There is, likewise, deep conflict among the Circuits on the substantive second question presented. Therefore, the Petition should be granted as to both questions presented.

I. *Certiorari* Should Be Granted Because the Panel's Decision Conflicts with This Court's and Other Circuits' Decisionmaking on the Injury to Nonmembers.

Respondents assert that the dual conflicts between the decision below, App. A at 1a-5a, and decisions of this Court

and other circuits on the first question presented, Pet. at i, ¶ 1, & at 9-22, are illusory. They are, unsurprisingly, comfortable with the radical abstraction of the lower courts' analysis of Petitioners' injury. By confusing "the constitutional requirements for the . . . collection of agency fees," *Hudson*, 475 U.S. at 310, with the public employer's action injuring nonmembers' constitutional rights (seizure of agency fees),[3] Respondents confuse a union's defiance of *Hudson* with the injury to First Amendment rights visited upon nonmembers whenever forced-unionism agreements are enforced.

Respondents answer the demonstrated conflict with this Court's forced-unionism jurisprudence, Pet. at 12-16, by broadly asserting that *Abood v. Detroit Board of Education*, 431 U.S. 209, 232 (1977), "makes clear" that "the First Amendment is not violated by implementation of" a forced-unionism agreement. Opp. at 8, *citing Hudson*, 475 U.S. at 301. However, *Abood* "makes clear" no such thing. To the contrary, quoting *Abood*, *Hudson* reaffirms that:

> requiring nonunion employees to support their collective-bargaining representative **"has an impact upon their First Amendment interests,"** *id.*, at 222, and may well "interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit," *ibid.* *See also id.*, at 255 (POWELL, J., concurring in judgment).

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[3] Respondents state that the injury was the union's "failure to provide [nonmembers] with adequate notice of the basis of the agency fee and to maintain a sufficient portion of collected fees in escrow pending fee arbitrations." Opp. at 7, *citing* Pet. at 3a. This seriously understates the deficiencies adjudicated. *See Prescott v. County of El Dorado*, 915 F. Supp. 1080, 1085-91 (E.D. Cal. 1996).

475 U.S. at 301 (emphasis added).

Thus, what *Abood* and *Hudson* make clear is that, absent compliance with *Abood*'s substantive limitations and *Hudson*'s procedural prerequisites, the First Amendment is violated by implementation of a forced-unionism agreement.

Like the decisions below, Respondents' Opposition boils down to the irrational proposition that nonmembers are injured by a piece of paper—the contents of a union's notice and procedure under *Hudson*. This conflicts with this Court's unambiguous holding that the public employer's seizure of agency fees injures nonmembers' rights. *Abood*, 431 U.S. at 222; *Hudson*, 475 U.S. at 301, 309; *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 876 n.4 (1998), as well as the decisions of other Circuits. *Wessel*, 299 F.3d at 1199 n.3 (injury caused by seizure of fees); *see also* Pet. at 16-17, *and cases cited therein.*[4]

This Court's bedrock principle likewise conflicts with the underlying theory of the decisions below—that the nonmembers had to demonstrate that the indemnification clause caused the inadequacies in the union's notice and procedures. Respondents' argument is nothing less than a studied effort to confuse the vaccination (notice and procedures) with the disease (unconstitutional seizure of agency fees) such prophylactic measures are intended to prevent.

Equally futile is Respondents' effort to defend the merits of the decision below by a "but-for" analysis and discussion of cases in which this Court rejected attenuated theories of liability

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[4] Concomitantly, absent actual or threatened agency fee seizures or discharge for nonpayment, nonmembers are not injured merely by the contents of a union's notice, which by itself is a harmless piece of paper.

under 42 U.S.C. § 1983 that challenged municipal policies "several steps removed" from the injurious action. Opp. at 8-13. A challenge to a municipality's establishment of a police force in an excessive force action, *Tuttle*, 471 U.S. at 823, cannot compare to this challenge to entry into an indemnification agreement without which the public employer would not have entered into the forced-unionism provision and—more importantly—would not have seized agency fees. App. C at 12a. The indemnification clause here was not the proverbial West African butterfly flapping its wings, causing the breeze ultimately resulting in the formation of Hurricane Andrew, or any other kind of contrivedly colorfully-overstated "Rube Goldberg contraption . . . too attenuated and speculative to support standing." Opp. at 11. As both the Sixth and the Second Circuits have recognized, it is a clause without which the forced-unionism agreement would not exist. *Weaver v. University of Cincinnati*, 970 F.2d 1523, 1537 (6th Cir. 1992); *Stamford*, 697 F.2d at 73-74. Here, it is a clause without which the forced-unionism agreement would neither exist **nor** be enforced. App. C at 12a.

Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 42-45 (1976), is not helpful to Respondents' analysis. *Simon* rejects a challenge to Treasury officials' ruling granting favorable tax treatment to hospitals denying non-emergency services to indigents, alleging that it "encouraged" denial of such services. But neither the hospitals nor their officials were joined in the action, and *Simon* addressed a circumstance in which the sued Treasury officials had no legal duty to the plaintiffs. *Id.* Here, in contrast, this Court already has held that "the government and union have a responsibility to provide procedures that minimize th[e] impingement [on First Amendment rights] and that facilitate a nonunion employee's ability to protect his rights." *Hudson*, 475 U.S. at 307

n.20. Moreover, this suit joins the County and Libicki, alleging that **they** enforced the forced-unionism agreement and therefore violated Petitioners' constitutional rights.

Finally, perhaps the most outlandish section of the Opposition is devoted to discussion of *Foster v. Madhesian*, 268 F.3d 689 (9th Cir. 2002). Contrary to Respondents' comments, it is not inappropriate to discuss the errors of another Ninth Circuit decision relied upon by the panel below. Neither is it relevant that the charitable legal-aid organization employing Petitioners' counsel employed counsel for the litigants in *Foster*.

Denial of the *Foster* petition, Opp. at 14, does not foreclose review here. The United States Reports are filled with denials of petitions where this Court, shortly thereafter, accepted for review cases raising similar or identical issues. Respondents' suggestion otherwise evidences a fundamental misapprehension of this Court's rules. *See* S. Ct. Rule 10 ("Review on a writ of certiorari is . . . a matter . . . of judicial discretion.").

II. The Court Should Grant *Certiorari* Because There Is Conflict Among the Courts of Appeals Concerning Employees' Standing to Challenge the Validity of Provisions of Collective Bargaining Agreements Governing Their Terms and Conditions of Employment.

Respondents doubtlessly recognize the difficulty in maintaining that Petitioners lack standing, when no other court has noticed or even mentioned this fatal jurisdictional defect in any decision addressing identical challenges by similarly-situated litigants. Indeed, Respondents' task is made doubly difficult because the "standing" issue was not one they raised below. App. G at 65a (raising question *sua sponte*). Respondents deny conflict between the decision below, App. A at 1a-

5a, and those of the Third and Sixth Circuits.[5] They note that none "expressly addressed the standing issue," Opp. at 21, and vigorously argue that Petitioners' argument is foreclosed by this Court's decisions noting that "the existence of unaddressed jurisdictional defects has *no precedential effect*." Opp. at 21 (original emphasis; citations omitted).

Respondents overlook the fact that this Court applies this rule only in **its own decisionmaking**. *Pennhurst State Sch. & Hospital v. Halderman*, 465 U.S. 89, 119 (1984) ("[W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio*, **this Court** has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us") (emphasis added), *quoting Hagans v. Lavine*, 415 U.S. 528, 533, n.5 (1974); *see also Will v. Michigan Dep't of State Police*, 491 U.S. 58, 63 n.4 (1989) (same). But that is not the Ninth Circuit's rule. *Alpine Ridge Group v. Kemp*, 955 F.2d 1382, 1385 (9th Cir. 1992) (because court decided the case, "it must necessarily have determined that jurisdiction was proper"), *rev'd on other grounds sub nom. Cisneros v. Alpine Ridge Group*, 508 U.S. 10 (1993).

Thus, Respondents' attempt to reconcile the conflict between this case and the Ninth Circuit's earlier decision in *Knight v. Kenai Peninsula Borough School District*, 131 F.3d 807, 817 (9th Cir. 1997), is unavailing. The Ninth Circuit has specifically adopted—for its own decisionmaking—the "implicit standing" doctrine rejected by this Court. *Stahl v. Gibraltor Financial Corp.*, 967 F.2d 335, 337-39 (9th Cir. 1992). Thus, that this Court does not consider itself bound when a subsequent case brings an unaddressed jurisdictional

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[5] *Weaver*, 970 F.2d at 1538; *Hohe v. Casey*, 956 F.2d 399 (3d Cir. 1992).

issue before it does not render *Weaver* and *Hohe* in harmony with the Ninth Circuit's decision below.

Moreover, Respondents erroneously assert that *Hohe* "did *not* address the issue of fee payers' standing to challenge the agency fee indemnification provision." Opp. at 21 n.8, *but see* App. E at 43a n.7 (original panel decision stating that *Hohe* "suggested that there was standing, but did not decide the issue"). In fact, *Hohe* reversed an explicit finding that non-members lacked standing to challenge a similar indemnification clause, 956 F.2d at 412, *rev'g* 740 F. Supp. 1092, 1098 (M.D. Pa. 1989), and ruled against nonmembers on the **merits** of their claim. Respondents miscast *Hohe* as a decision that merely applied "the jurisprudential rule of avoiding the resolution of constitutional questions that are not necessary to the outcome of the case." Opp. at 21 n.8.

Equally baseless is Respondents' denial that the decision below conflicts with the Tenth Circuit's decision in *Wessel*. Respondents' dismissive characterization of the decision on the standing question ("pure *ipse dixit*," Opp. at 23) is absurd. The Tenth Circuit explicitly held that "we disagree with the Ninth Circuit's [standing] analysis." *Wessel*, 299 F.3d at 1199 n.3.[6]

Respondents' suggestion—that the petition should be denied to "permit other circuits an opportunity to consider the issue," Opp. at 23—also is disingenuous. Contrary decisions on employees' standing to challenge indemnification provisions in forced-unionism agreements have been rendered by three other Circuits (Third, Sixth, and Tenth), and by another panel of the

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[6] It then said, contrary to the Third Circuit in *Hohe*, but in accord with the Sixth Circuit in *Weaver*, "we . . . hold that the indemnification provisions are void as contrary to public policy." *Wessel*, 299 F.3d at 1199; *see* Pet. at i, ¶ II and at 23-29.

Ninth Circuit itself, in *Knight*. *See* Pet. at 20-23. This is sufficient to warrant review in light of the seriousness of both of the questions presented. *See Communications Workers of America v. Beck*, 487 U.S. 735, 741-42 (1988) (conflict between two circuits sufficient to warrant review concerning validity of common term of collective bargaining agreements).

CONCLUSION

For the reasons stated above, this petition for a writ of *certiorari* should be granted, and the case set for plenary briefing and argument on the important questions presented herein.

Respectfully submitted,

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